

## Brigham Young University Law School BYU Law Digital Commons

---

### Utah Supreme Court Briefs (1965 –)

---

1981

# Debra Lynn Martineau v. Elliot J. anderson and Mary Christine anderson : Petition For Rehearing

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

MAX D. WHEELER, CRAIG STEPHENS COOK; ATTORNEYS FOR PLAINTIFF

APPELLANTPHILIP R. FISHLER, JR.; ATTORNEY FOR DEFENDANTS- RESPONDENTS

---

### Recommended Citation

Petition for Rehearing, *Martineau v. Anderson*, No. 16923 (Utah Supreme Court, 1981).

[https://digitalcommons.law.byu.edu/uofu\\_sc2/2206](https://digitalcommons.law.byu.edu/uofu_sc2/2206)

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE STATE OF UTAH

-----

DEBRA LYNN MARTINEAU,

Plaintiff-  
Appellant,

vs.

No. 16923

ELLIOT J. ANDERSON and  
MARY CHRISTINE ANDERSON,

Defendants-  
Respondents.

-----

PETITION FOR REHEARING

MAX D. WHEELER  
SNOW, CHRISTENSEN & MARTINEAU  
P. O. Box 3000  
Salt Lake City, Utah 84110

CRAIG STEPHENS COOK  
3645 East 3100 South  
Salt Lake City, Utah 84109

ATTORNEYS FOR PLAINTIFF  
APPELLANT

PHILIP R. FISHLER, ESQ.  
600 Boston Building  
Salt Lake City, Utah 84111

ATTORNEY FOR DEFENDANTS-  
RESPONDENTS

FILED

SEP 21 1981

-----  
Clk., Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

-----

DEBRA LYNN MARTINEAU,

Plaintiff-  
Appellant,

vs.

No. 16923

ELLIOT J. ANDERSON and  
MARY CHRISTINE ANDERSON,

Defendants-  
Respondents.

-----

PETITION FOR REHEARING

MAX D. WHEELER  
SNOW, CHRISTENSEN & MARTINEAU  
P. O. Box 3000  
Salt Lake City, Utah 84110

CRAIG STEPHENS COOK  
3645 East 3100 South  
Salt Lake City, Utah 84109

ATTORNEYS FOR PLAINTIFF  
APPELLANT

PHILIP R. FISHLER, ESQ.  
600 Boston Building  
Salt Lake City, Utah 84111

ATTORNEY FOR DEFENDANTS-  
RESPONDENTS

IN THE SUPREME COURT OF THE STATE OF UTAH

-----

DEBRA LYNN MARTINEAU,

Plaintiff and  
Appellant,

vs.

PETITION FOR REHEARING

ELLIOT J. ANDERSON and  
MARY CHRISTINE ANDERSON,

No. 16923

Defendants and  
Respondents.

-----

This Court has established the rule that for a rehearing to be granted it is necessary for the petitioning party to show that the Court has misconstrued material facts, overlooked statutes or decisions which might affect the result, based the decision on wrong principles of law, or misapplied or overlooked something which materially affects the result. Cummings v. Nielson, 42 Utah 157, 129 Pac. 619 (1919).

Appellant believes that this criteria is met in this case since the majority opinion has created a serious inconsistency between the obligations of counsel and a trial court in the supervision and control of a verdict.

In the majority opinion it is stated that plaintiff's counsel waived the clearly erroneous form of the verdict since counsel did not request to see the verdict form and

consequently did not object to its inconsistency until after the jury had been excused. (Slip opinion, p. 5). The majority opinion quoted the Langton and Cohn cases in support of the proposition and concluded that "counsel has the obligation not only to object to the form of the verdict but to affirmatively seek to examine it."

As a practical matter, the majority opinion has placed the entire burden of supervising a jury verdict upon counsel and has eliminated all burden upon the trial court. Under the majority's ruling once a verdict is rendered, counsel for the parties must demand to see it from the court or run the risk of waiving undisclosed defects. The court must show it to counsel in order to avoid the claim that counsel was not afforded opportunity to object. Counsel then must decide whether to request the jury verdict to be resubmitted to the court or to allow it to be entered. The trial court, under the majority's ruling, has no discretion or choice but to allow the counsel to take complete control as to what should occur with the verdict form.

In the instant case, for example, the lower court incorrectly resubmitted the matter to the jury without counsel's specific request to do so since only counsel, under the majority opinion, has the responsibility to correct errors and request resubmission.

Obviously, this scenario is inconsistent with

Rule 47(r), Utah Rules of Civil Procedure, which states:

If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

In addition, §78-7-5, U.C.A., provides that every court has the power:

(5) to control in furtherance of justice the conduct of its ministerial officers, and all other persons in any manner connected with a judicial proceeding before it in every matter pertaining thereto; and

(8) to amend and control its process and orders so as to make them conformable to law and justice.

It is well-established by this Court that a trial court must correct an error found by the trial court in the jury's deliberation and resubmit the matter to the jury for correction. Jorgensen v. Gonzales, 383 P.2d 934 (Utah 1963). This principle was stated by the Court of Appeals of Oklahoma in Hamilton v. Duffy, 540 P.2d 600 (C.T. App. Okla. 1975) where the court stated:

It is the duty of the trial court to scrutinize both the form and the substance of any verdict which is returned to prevent insufficient or inconsistent findings from becoming a part of the record of the Court. It is normal and proper to ask the jury to correct a verdict which is insufficiently formulated, usually by returning to the jury room to deliberate further. The court is not bound to accept a verdict which is not in accordance with its instructions. Where jurors return a verdict which is incomplete or ambiguous the court should direct them to retire for further deliberations. Id. at 602 (Citations omitted, emphasis added.)

It is obvious that there is an inconsistency now created by this Court's majority opinion. In effect, this Court has stated that counsel is given the right and obligation to examine each verdict as it is returned by the jury. The trial court has no discretion to refuse such a request since to do so might result in prejudicial error. The trial court, under the majority opinion, therefore, cannot on its own initiative return a verdict for further deliberation without a specific request having been entered by the counsel for either party. This is contrary to the above-cited statutes, rules, and case law which obviously vest the trial court with considerable discretion in this regard.

The Johnson v. Simons case cited by the majority opinion contained a similar problem to the instant case. Here, it is undisputed that the clerk incorrectly read the verdict form, thereby failing to alert plaintiff's counsel to the inconsistency existing. In Johnson, the trial court, during a conference, agreed to give a certain instruction concerning contributory negligence but actually failed to do so. Counsel was not given a copy of the instruction until after the jury had been released. The dissenting opinion written by Justices Elliott and Henroid noted the lack of opportunity of counsel to object to the erroneous omission of the instruction. The dissenting opinion stated:



It seems rather obvious that it would be difficult for counsel, listening to the reading of the long set of instructions, to recall just what was given, and this would especially be true where the judge had lulled counsel into a feeling of security by promising to give the substance of a particular instruction. Id. at 518.

In Johnson, even though it was difficult for counsel to detect the missing instruction, it was still possible by carefully listening to what was said in open court.

In this case, it was not possible for counsel to detect the defective verdict without actually seeing it. Contrary to the statement of the majority opinion, counsel was not shown the verdict form at the bench conference with Judge Banks nor did the judge disclose the verdict's contents.

The majority opinion has created a situation in which counsel can no longer trust the actions of either the clerks or the court. For example, in order to avoid waiving instructions to the jury counsel can no longer rely upon the fact that the court claims to submit the same written instructions to the jury as has been read. If the court or the clerk mistakenly submit erroneous instructions to the jury which have not been previously read by the court, counsel would be deemed to have waived any objection since counsel did not examine the exact instructions submitted to the jury but relied upon the representation of the court that the same instructions would actually be submitted to the jury room. Likewise, each time a verdict is read in the district court it will be incumbent upon



counsel to demand to see the verdict form regardless of how simple it may be in its reading in order to insure that the clerk or the court has not mistakenly omitted or included parts of the verdict form. Counsel can no longer accept what the trial court states as the verdict or what the clerk states as the verdict to rely upon since, under the majority opinion, even if the court or the clerk mistakenly or deliberately misreads the verdict form, it is counsel, not the court or the court personnel, which must bear the responsibility for the error.

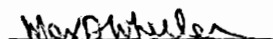
The burden placed upon counsel in this case is unreasonable and contrary to the rule requiring the trial court to also have responsibility for the supervision of the court personnel and verdict form. To take an extreme example, suppose that a trial has developed between a plaintiff and defendant on the question of negligence. Special interrogatories are asked, just as in the instant case, in which the jury answers that the defendant was negligent, that the negligence of the defendant was not a proximately cause of the accident, and finds damages in favor of plaintiff for \$20,000. The trial court sees that the form is inconsistent since damages are found even though the defendant is not proximately related to the accident. Nevertheless, the court allows the clerk to read the verdict form. The clerk misreads the second answer and declares that the defendant's conduct was a proximate cause of the accident. Counsel for the defendant has


nothing to object to since the verdict as read sounds consistent. The jury is excused. The verdict form is later examined by counsel and an objection is made. The trial court overrules the objection by stating that counsel should have demanded to see the verdict form before the jury was excused and therefore any erroneous form is waived.

In this extreme example the lower court completely failed to supervise its court personnel in the reading of the verdict and failed to note the inconsistency of the verdict form. Nevertheless, under the majority's opinion the verdict would stand since defense counsel failed to object to an unobjectionable verdict form as read. The instant case is indeed unusual. It is an instance where the court clerk omitted to read the very essence of the verdict form which made it appear inconsistent. Such an occasion is admittedly rare, but the principle remains the same. It is contrary to Utah law, Utah Rules of Procedure, and this Court's prior decisions to place the burden of erroneous readings of verdicts upon counsel and not upon the court who, in this case, had examined the verdict form and knew or should have known that parts of the form had been omitted, when read by the clerk.

For this reason, appellant respectfully requests that a rehearing be granted solely as to the question of waiver and the burdens imposed upon counsel under the various aspects of Utah law in order to allow a full briefing and hearing upon the matters raised herein.

Respectfully submitted this 24 day of September, 1981.

  
MAX D. WHEELER

  
CRAIG S. COOK

Attorneys for Plaintiff-Appellant  
P. O. Box 3000  
Salt Lake City, Utah 84110

MAILING CERTIFICATE

This is to certify that a true and correct copy of the foregoing Petition for Rehearing was mailed the 24th day of September, 1981, to Phil Fishler, attorney for defendants and respondents, 600 Boston Building, Salt Lake City, Utah 84111.

